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Family Law—Legitimation Proceeding by Father of Child Born Out of Wedlock

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Note

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Plaintiff brought an action in equity against the mother of two children born out of wedlock for the purpose of having himself declared father of the children, entitled to visitation and all other rights attendant upon paternity, and for such other and further relief as equity may require. The trial court decreed that plaintiff was the father, that he pay $10 per week in support, and that he be entitled to reasonable visitation. On appeal, *Held:* Plaintiff has no cause of action. *Paltani v. Creel,* 169 Neb. 591, 100 N.W.2d 736 (1960).

The court reasoned that since this action had not been instituted within the procedure specified by statute[1] there was no authority for its maintainance, citing *Timmerman v. Timmerman.*[2] In that case the paternity issue was raised by the father on a cross petition in a divorce action. Such a proceeding was specifically provided for by statute which allows the court, upon decreeing a divorce, to make a further decree concerning the care of any minor children.[3] The court concluded in dicta, however, that in the absence of statutory provision, paternity proceedings could not be maintained.[4]

Although it is conceded that this action was not provided for by statute, the court might have granted such relief under the general equity power conferred upon the courts by the state Con-

[1] NEB. REV. STAT. § 13-106 (Reissue 1954) provides that an action in equity may be brought against a father for support of a child by the mother, guardian, or next of friend of the child, or by the county which may be required to support the child.
NEB. REV. STAT. § 13-113 (Supp. 1957) provides that in addition to all other provisions of Chapter 13 a complaint accusing a person of being the father of a child born out of wedlock may be made by any mother or by the Attorney General of Nebraska.

[2] 163 Neb. 704, 81 N.W.2d 135 (1957). See Paltani v. Creel, 169 Neb. 591, 593, 100 N.W.2d 736, 738 (1960).

[3] NEB. REV. STAT. § 42-311 (Reissue 1952).

[4] Timmerman v. Timmerman, 163 Neb. 704, 710, 81 N.W.2d 135, 139 (1957).

stitution.[5] The court has often elaborated that equity is conferred by the Constitution beyond the power of the legislature to control, and while the legislature may grant jurisdiction as it seems proper, it cannot take from the courts the broad jurisdiction which the Constitution has conferred in them.[6] The Nebraska court has been active in exercising its equitable jurisdiction in the domestic relations field of separate maintainance,[7] and other examples can be found in supervision and administration of trusts,[8] liquidation of insolvent banks,[9] abuse of attorney's confidential relation with a client,[10] adequacy of price in a foreclosure sale,[11] specific performance of an oral contract,[12] and quieting title.[13] Thus it would follow that even though the legislature has specified a means for determining the paternity of children born out of wedlock, this would not restrict the court's equitable power to grant the relief sought herein by the plaintiff father.

Although the court rejects this argument, their conclusion is justifiable for reasons of public policy. In a paternity or legitimation proceeding, the best interests of the child are paramount, and any determination regarding support and visitation must yield to the good of the child.[14] The record shows that the mother receives a salary of $320 per month, and that the children are cared for during the day by their grandmother. The record further shows that the father used an assumed name when he began to date the mother, that he was then married and the father of four legitimate children, and that he has since been divorced by his wife in which proceeding he was denied visitation rights to his

[5] NEB. CONST. art V, § 9.

[6] As merely representative of a line of cases so holding, see State *ex rel.* Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

[7] See Scott v. Scott, 153 Neb. 906, 907, 46 N.W.2d 627, 629-30 (1951), citing additional authority.

[8] See Burnham v. Bennison, 121 Neb. 291, 236 N.W. 745 (1931); and Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N.W. 449 (1941).

[9] See State *ex rel.* Sorenson v. Farmers' State Bank, 121 Neb. 532, 237 N.W. 857 (1931).

[10] See Hall v. Hall, 123 Neb. 280, 242 N.W. 607 (1932).

[11] See County of Nance v. Thomas, 146 Neb. 640, 20 N.W.2d 925 (1945).

[12] See Lacy v. Ziegler, 98 Neb. 380, 152 N.W. 792 (1915).

[13] See Matteson v. Creighton University, 105 Neb. 219, 179 N.W. 1009 (1920).

[14] Dillman v. Dillman, 105 So.2d 33 (Fla. App. 1958). See also 7 AM. JUR., *Bastards* §§ 60, 68 (1937); and 10 C.J.S., *Bastards* § 17 (1938).

legitimate children. Thus the court may have concluded that the two children are satisfactorily supported and cared for by their mother and grandmother, and that their father's influence would be neither necessary nor desirable. Such a justification is, however, hard to reconcile technically with the court's holding that a valid cause of action was not even pleaded,[15] as fitness of the parents would be a matter for determination by the trial court, which would be in a better position to so determine than the reviewing court.[16]

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[15] Paltani v. Creel, 169 Neb. 591, 594, 100 N.W.2d 736, 738 (1960).

[16] See Darwin v. Ganger, 344 P.2d 353, 359 (Cal. App. 1959).